

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 15 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0358-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICHARD MARTINEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080065001

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Richard Martinez

Florence
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 Petitioner Richard Martinez seeks review of the trial court's order denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief

absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Martinez has not sustained his burden of establishing such abuse here.

¶2 After pleading guilty to the charges against him, Martinez was convicted of four counts of armed robbery and seven counts of aggravated assault, all dangerous-nature offenses, and two counts of weapons misconduct. The trial court imposed consecutive and concurrent presumptive prison terms totaling twenty-one years. Martinez then initiated an of-right post-conviction relief proceeding in which he sought to withdraw his guilty plea on the grounds that the grand jury proceeding had been flawed and that the state had breached its agreement not to recommend he receive consecutive sentences. He further maintained trial counsel had been ineffective in failing to object in relation to either issue. The court agreed the state had breached the agreement, but concluded Martinez should be resentenced by another judge, with the benefit of the state’s promise. This court affirmed that ruling on review. *State v. Martinez*, No. 2 CA-CR 2010-0066-PR, ¶ 9 (memorandum decision filed Aug. 17, 2010).

¶3 Before Martinez could be resentenced, he petitioned for post-conviction relief a second time, arguing that the state had breached the plea agreement by relying on his prior convictions at sentencing and by failing to dismiss other charges against him, that the trial court had imposed restitution improperly, and that he had received ineffective assistance of counsel in his of-right Rule 32 proceeding. The court summarily denied relief, finding his claims precluded and the petition “not ripe under Ariz. R. [Crim. P.] 32.4(a)” because he had not yet been resentenced. On review, this court granted Martinez partial relief, concluding his claim of ineffective assistance of Rule 32 counsel

was neither untimely nor precluded. *State v. Martinez*, 226 Ariz. 464, ¶¶ 12-13, 250 P.3d 241, 244-45 (App. 2011). We remanded the matter to the trial court for a ruling on whether counsel had been ineffective. *Id.*

¶4 Martinez ultimately was resentenced in November 2011, and the trial court again imposed a combination of consecutive and concurrent presumptive terms totaling twenty-one years' imprisonment. It also ordered Martinez to pay restitution to the bank he had robbed as it had at the first sentencing. Before the resentencing took place, however, Martinez filed two more pro se petitions for post-conviction relief, the first arguing that a definite date for resentencing should be set and that Rule 32 counsel was ineffective in failing to obtain such a date, and the second rearguing issues he had raised in his previous Rule 32 proceedings. The court stated that, based on this court's most recent decision in the matter, it would consider only "the claims in relation to whether . . . Rule 32 counsel was ineffective for failing to raise [the issues] in [Martinez's] first of-right petition." It summarily rejected those claims, concluding Martinez had not presented a colorable claim for relief.

¶5 On review, Martinez again argues he should be allowed to withdraw from his plea agreement because of the state's breach in failing at sentencing to dismiss the other indictment against him. That indictment ultimately was dismissed. In any event, as the trial court noted and as this court specifically stated in our last decision, *Martinez*, 226 Ariz. 464, ¶¶ 4, 8, 250 P.3d at 242-43, this claim is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶6 Martinez further contends the trial court improperly ordered him to pay restitution to the bank he had robbed. First, any claim as to the original restitution order is moot as a result of his original sentence having been vacated. *See State v. Prince*, 206 Ariz. 24, ¶ 4, 75 P.3d 114, 116 (2003) (“Because [defendant] will be resentenced, all other sentencing issues he asserts are moot.”). And to the extent Martinez now seeks to challenge the restitution ordered at his resentencing, such a claim is not cognizable here. We cannot characterize his petition below as a petition for post-conviction relief from his new sentence because it would be impermissibly premature. *See State v. Saenz*, 197 Ariz. 487, ¶¶ 3-6, 4 P.3d 1030, 1031-32 (App. 2000).

¶7 Martinez maintains on review that counsel in his of-right Rule 32 proceeding was ineffective for having failed to raise these issues. But he does not explain how counsel’s performance fell below prevailing professional norms or how he was prejudiced by any purportedly deficient performance. *See Ariz. R. Crim. P. 32.9(c)(1)(iv)* (petition for review shall contain “[t]he reasons why the petition should be granted”); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to prevail on claim of ineffective assistance of counsel, defendant must show counsel’s conduct fell below prevailing professional norms and conduct prejudiced him). Indeed, the other indictment against Martinez ultimately was dismissed and, because he was resentenced, any ineffective assistance claim related to restitution ordered at his first sentencing was rendered moot. Finally, Martinez does not address on review the trial court’s rulings on the other claims of ineffective assistance of counsel he raised below, so we do not address

them. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii). Therefore, although we grant the petition for review, we deny relief.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge